

IN THE

Supreme Court of the United States

No. 118

October Term, 1942.

HOWARD KIKER,

Petitioner-Plaintiff,

vs.

THE CITY OF PHILADELPHIA, BERNARD SAMUEL,
Acting Mayor of Philadelphia, **DAVID W. HARRIS,**
Receiver of Taxes, and **ERNEST LOWENGRUND,**
Acting City Solicitor,

Defendants-Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA, WITH
BRIEF IN SUPPORT THEREOF.**

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SUPREME COURT OF THE UNITED STATES.

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HOWARD KIKER,
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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA, WITH
BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Howard Kiker, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania contained in that Court's opinion and entered in the above-entitled cause on March 29, 1943¹ (Record, p. 25a), affirming the decree of Common Pleas Court No. 4 of the County of Philadelphia (p. 23a),² which dismissed petitioner's class bill for injunction.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Plaintiff, a domiciliary resident of New Jersey, has been for the last sixteen years "regularly employed by the United States of America, in the Federal area known as the League Island Navy Yard, near the said City of Philadelphia (but not a part thereof), as a supervisor, planner and estimator in the Industrial Department of said Navy Yard." (pp. 2a, 3a)

Title to the Federal area in which plaintiff worked had been acquired by the United States through deeds of conveyance from private owners. (p. 3a) Supplementing these conveyances, the Commonwealth of Pennsylvania had ceded jurisdiction over the lands conveyed to the United States by three successive acts: The Act of March 29, 1827, (P. L.

¹ Appellate practice in the Pennsylvania Supreme Court dispenses with the necessity of entry of judgment upon filing the opinion of the Court in the clerk's (prothonotary's) office.

² Page references in parentheses are to the appeal record, unless otherwise stated.

153);³ the Act of February 10, 1863 (P. L. 24);⁴ and the Act of April 4, 1866 (P. L. 96).⁵ Pursuant to an Act of Congress approved February 18, 1867 (14 U. S. St. at L. c. 46, p. 396) a certificate of acceptance for the lands thus ceded, dated December 23, 1868, was recorded in the Office of the Recorder of Deeds of Philadelphia County. (pp. 3a, 27a). As a result of these several Acts the power to tax persons and property on League Island was vested exclusively in the United States for so long as it should maintain a navy yard there.

In 1932 the Commonwealth of Pennsylvania adopted the Sterling Act (1932, P. L. 45) and thereby delegated to cities of the first and second classes (Philadelphia being of the first class) the power "to levy, assess and collect * * * such taxes on persons, transactions, occupations, privileges, objects and personal property *within the limits of such city* of the first and second class as it shall determine"* except in cases where the State itself had already imposed or might thereafter impose such taxes. Thereafter, on December 13,

³ Cedes and conveys "all the jurisdiction, right, title, property and interest of this commonwealth, over, in and to, the territory now in possession of the United States and occupied as a navy yard, included within the present wall around the same, * * *"

⁴ " * * * ceding to the United States of America the right of exclusive legislation over League Island, in the Delaware river, in the county of Philadelphia—for naval and other purposes, according to the terms of the constitution of the United States" and providing in Section 3 that upon acceptance by the United States, "the sovereignty and right to exclusive jurisdiction over all the said premises shall be vested in the United States."

⁵ "That in order to vest in the United States of America the complete title and jurisdiction, for naval, and national uses, over all League Island, and its appurtenances, with the water basin, or channel, between it and the mainland, together with the northerly shores thereof—the consent of this commonwealth is hereby granted * * *"

* Italics supplied. The Act *in extenso* is printed in the Appendix hereto, p. 24.

1939, the City of Philadelphia promulgated its present income tax ordinance, there being then no state income tax in effect. (pp. 3a, 4a, 42a). This ordinance imposed an annual tax of $1\frac{1}{2}\%$ "on salaries, wages, commissions, and other compensation earned after January 1, 1940, by residents of Philadelphia, and on salaries, wages and other compensation earned after January 1, 1940, by nonresidents of Philadelphia for work done or services performed or rendered in Philadelphia." (p. 6a and Appendix p. 26).

This ordinance in its application to Navy Yard employees resident in Philadelphia was upheld in *Phila. v. Schaller*, 148 Pa. Super. 276, and *certiorari* was denied by this Court on October 12, 1942, 87 L. ed. (Adv. ops.) 38, 63 Sup. Ct. 43; but that decision did not touch on the tax status of non-residents of Philadelphia. Prior to 1941 no attempt was made to enforce the ordinance against Federal employees at League Island Navy Yard who were not resident in Philadelphia, but on October 9, 1940, Congress had enacted Public Act #813 (4 USC sec. 14 *et seq.*) providing, by section 2, that persons living or earning income in a Federal area would not be relieved by reason of such residence or employment, from liability to pay an income tax levied by a state or any duly constituted taxing authority "having jurisdiction to levy such a tax." This Act was construed by the City Solicitor as making liable to the City wage tax those Federal employees at League Island who had previously been treated as exempt, and these were thereupon threatened with prosecution if they did not file returns and submit to assessment. (p. 7a).

This suit was brought to enjoin such attempted enforcement of the ordinance. The case was heard and determined in the court of first instance upon Bill of Complaint filed December 16, 1942, and Preliminary Objections thereto filed the following day. These objections, in effect a demurrer to the bill, were argued on December 28, 1942, before Com-

mon Pleas Judge Bluett, who sustained the objections and dismissed the bill in an opinion filed December 31, 1942 (p. 13a). From a final decree entered on January 5, 1943, an appeal was taken to the Supreme Court of Pennsylvania, which affirmed the decree by a vote of four to two, the majority opinion by Drew, J. (p. 25a), and the minority opinion by Maxey, C. J. (p. 44a), being filed on March 29 last.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Sec. 344 (Judicial Code, Sec. 237 as amended).

After asserting in his bill of complaint that the City had no power to impose the tax in question upon nonresidents of the City for services rendered outside the City, and that the City was attempting to tax persons who received no protection or benefit from the city, petitioner further alleged "that such attempt, if successful, will result in the taking of plaintiff's property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution." (p. 8a).

This claim to a violation of rights guaranteed by the Federal Constitution was rejected by the Common Pleas Court. The contention was reasserted on appeal to the Supreme Court of Pennsylvania, this being the highest court of that state in which a decision could be had. That court affirmed the lower court.

There was thus drawn into question in this litigation in the state courts the validity of the attempted enforcement of a municipal tax ordinance, there attacked on the ground that such enforcement was repugnant to the Fourteenth Amendment of the Constitution of the United States, and

violative of rights, privileges and immunities given by that Amendment, and especially set up and claimed by the petitioner.

THE QUESTIONS PRESENTED.

The questions for determination here are the following:

Where the United States, Acting under Article I, Sec. 8, Par. 17 of the Constitution, has accepted from a State the cession of part of its territory and thereby acquired the exclusive power to tax persons therein, does a City in that State, of which the federal area was a part prior to said cession, gain from the United States this attribute of "exclusive legislation" in said area without formal cession and acceptance thereof, but merely by virtue of a general act of Congress (U. S. C., Title 4, Sec. 14 et seq.) which declares that "no person shall be relieved from liability for an income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area • • •"?

If such federal Act may be construed as ceding to the City the power to tax wages of federal employees in a federal area adjoining such city, is the act effective *ex proprio vigore* to extend the scope of a preexisting City ordinance, which imposes a wage tax on persons residing or working within the city's borders, so as to cover nonresident federal employees working within said adjoining federal area?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The decision of the Pennsylvania Supreme Court that U. S. Public Act 819 has the effect of enlarging the scope of the Philadelphia Income Tax Ordinance of December 13, 1939, so as to render taxable nonresident workers in the United States Naval Reservation at League Island, is not in accord with applicable decisions of this Court (as shown in the accompanying brief of petitioner).

II. The State Court should have held that Public Act 819 was not effective to enlarge the taxing powers of the City of Philadelphia, or to extend the effect of its existing wage tax ordinance to federal employees working at League Island Navy Yard but nonresident in Pennsylvania, because—

(a) At the time of the passage of the Tax Ordinance the Naval Reservation at League Island was part of the United States, enjoyed no protection from the City, and hence was not subject to the Ordinance;

(b) The subsequent passage of U. S. Public Act 819 did not touch the Naval Reservation, since the words “Federal area” as used in the Act did not embrace lands previously ceded to the United States;

(c) Under no valid construction of Public Act 819 may the United States be held to have ceded the sovereign power of taxation theretofore vested in it, back to the ceding State or directly to the City;

(d) Even if cession had been intended, it was not and could not be accepted by the City;

(e) Even if acceptance could be presumed, the new power of taxation thus supposedly ceded or granted to the City would have had to be exercised by adoption of a new ordinance. The federal Act could not of itself extend the scope and force of the preexisting tax ordinance.

III. Involved in this cause is the question of the power of the several states and their lesser taxing authorities to tax the wages of nonresident Federal employees in hundreds of Federal areas throughout the country. The relation of U. S. Public Act 819 to this asserted power in the states and their municipalities has not been authoritatively defined, and judicial determination thereof is a matter of wide public concern.

For these reasons it is respectfully submitted that this petition should be granted.

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Camden, New Jersey.
 June, 1943.